

**National Institute of Standards and Technology****15 CFR 231****[Docket No. 231218-0308]****RIN 0693-AB70****Preventing the Improper Use of CHIPS Act Funding; Revised Definition of “Material Expansion”**

AGENCY: CHIPS Program Office, National Institute of Standards and Technology, Department of Commerce.

ACTION: Final rule.

SUMMARY: The Department of Commerce (the Department), through the National Institute of Standards and Technology, is amending the definition of “material expansion” in the September 25, 2023 final rule, Preventing the Improper Use of CHIPS Act Funding, to clarify that the construction of new semiconductor manufacturing facilities falls within the scope of the rule.

DATES: This final rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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Please direct media inquiries to the CHIPS Press Team at press@chips.gov.

SUPPLEMENTARY INFORMATION:**Background**

The CHIPS Act, 15 U.S.C. 4651, et seq., established a semiconductor incentives program (CHIPS Incentives Program) to incentivize, through Federal funding, investments in the construction, expansion, and modernization of facilities and equipment in the United States for the fabrication, assembly, testing, advanced packaging, production, or research and development of semiconductors, materials used to manufacture semiconductors, or semiconductor manufacturing equipment. The CHIPS Incentives Program is administered by the CHIPS Program Office (CPO) within the National Institute of Standards and Technology (NIST) of the Department.

On March 23, 2023, CPO published a proposed rule that requested comment on defined terms used in the Act (including terms that will be used in required agreements with covered entities),

identified the types of transactions that are prohibited under the Expansion Clawback and Technology Clawback sections of the Act, and provided a description of the proposed process for notification of certain transactions to the Secretary (88 FR 17439). After considering extensive public comments, on September 25, 2023, CPO published a final rule Preventing the Improper Use of CHIPS Act Funding (88 FR 65600). Among other issues, the final rule addressed the Expansion Clawback, which prohibits the covered entity and members of its affiliated group from engaging in any significant transaction involving the material expansion of semiconductor manufacturing capacity in a foreign country of concern. The final rule also addressed the exceptions to this general prohibition.

The definition of “material expansion,” which is used both in the general prohibition and in one of the exceptions, focused on the expansion of “existing” semiconductor manufacturing facilities, which created confusion as to whether the construction of entirely new semiconductor fabrication facilities fell within the scope of the final rule. This update to the final rule clarifies that new facilities are included within the scope of the final rule.

Changes from the Final Rule

Definition of Material Expansion

The final rule defines “material expansion” as an “increase of the semiconductor manufacturing capacity of an existing facility by more than five percent of the capacity memorialized in the required agreement due to the addition of a cleanroom, production line or other physical space, or a series of such additions.” 15 CFR 231.108.

Defining material expansion in relation to “an existing facility” had the unintended effect of suggesting that the construction of new semiconductor facilities fell outside the scope of the Expansion Clawback. Such an interpretation would be inconsistent with the CHIPS Act and the general restrictions of the Expansion Clawback, which significantly limit the ability of covered entities to expand their semiconductor manufacturing capacity in foreign countries of concern. Indeed, CPO made clear in the proposed rule and in the preamble to the final rule that the restrictions of the Expansion Clawback were intended to apply to the construction of a new facility. In the preamble of the proposed rule, CPO noted that the term “material expansion” included “*the construction of new facilities* and the addition of new

semiconductor manufacturing capacity and uses a quantitative measure of 5 percent of existing capacity to provide clear and predictable scoping.” 88 FR 17439, 17441 (emphasis added). Further, the definition in the proposed rule provides: “Material expansion means the addition of physical space or equipment that has the purpose or effect of increasing semiconductor manufacturing capacity of a facility by more than five percent or a series of such expansions which, in the aggregate during the applicable term of a required agreement, increase the semiconductor manufacturing capacity of a facility by more than five percent of the existing capacity when the required agreement was entered into.” *Id.* at 17447. This definition used the term “facility” generally, resulting in an interpretation that a facility may be either new or existing.

Commenters also understood that the Expansion Clawback was intended to address the construction of new semiconductor facilities. CPO received 27 comment submissions, and a significant portion of those comments related to material expansion. Numerous commenters noted that the intent of the CHIPS Act was to allow existing facilities in a foreign country of concern to continue to operate so that ongoing operations would not be undermined and so funding recipients could realize the value of their prior investments. Commenters did not raise significant concerns with placing restrictions on the construction of new facilities, and in some instances suggested that the definition of material expansion be modified to clarify that it was triggered by new construction (“material expansion means building new cleanroom space that does not exist on the date of the [award];” material expansion should apply to “building new clean room/physical space”). There was a general understanding that the Expansion Clawback was intended to address new construction.

In the final rule, CPO provided explanations that reflect the intent for the Expansion Clawback to address the construction of new facilities. In response to comments on the definition of Significant Renovations, CPO noted that “[w]ithout the concept of significant renovations, covered entities could evade the expansion prohibition simply by significantly expanding an existing facility rather than *constructing a new facility*.” 88 FR 65600, 65607. This response assumes that the construction of new facilities was addressed by the Expansion Clawback, and that the concept of significant renovations was needed to prevent circumvention of that prohibition.

In this rule, the modified definition of “material expansion” better reflects the intended scope of the Expansion Clawback.

Classification

Administrative Procedure Act (APA)

Pursuant to 5 U.S.C. 553(a)(2), the provisions of the APA requiring notice of proposed rulemaking and the opportunity for public participation are inapplicable to this rule, which places certain limitations on funding recipients, because it relates to “public property, loans, grants, benefits, or contracts.”¹

Additionally, although it was not required to do so, the Department, through the March 23, 2023, proposed rule, provided advance notice and opportunity for public comment on the definition of the term “material expansion.”

This final rule simply corrects an inadvertent omission in the definition of “material expansion,” thereby accurately reflecting the Department’s explanation and discussion of public comments in the September 25, 2023, final rule. Additional advance notice and opportunity for comment would neither provide new information to the public nor inform any agency decision-making regarding the defined term. Finally, additional opportunity for public comment would be contrary to the public interest, under 5 U.S.C. 553(b)(B), because this rule provides clarity to applicants and awardees.

Executive Order 13132

This rule does not contain policies with federalism implications as that term is defined in Executive Order 13132.

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this final rule is significant for purposes of Executive Order 12866.

Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by 5 U.S.C. 553(a)(2), the analytical requirements of the Regulatory Flexibility Act, 5

¹ The provisions of this amendment implement the Expansion Clawback provisions of the Act and are also thus exempt from the rulemaking provisions of the APA pursuant to 15 U.S.C. 4652(a)(6)(A)(iii).

U.S.C. 601, et seq., are not applicable. Accordingly, no regulatory flexibility analysis is required and none has been prepared.

Paperwork Reduction Act

This action does not contain a collection of information requirement for the purposes of the Paperwork Reduction Act (44 U.S.C. 3501, et seq.).

List of Subjects in 15 CFR Part 231

Business and industry, Computer technology, Exports, Foreign Trade, Government contracts, Grant Programs, Investments (US investments abroad), National defense, Research, Science & Technology, and Semiconductor chip products.

For reasons set out in the preamble, 15 CFR part 231 is amended as follows:

PART 231—CLAWBACKS OF CHIPS FUNDING

1. The authority citation for 15 CFR part 231 continues to read as follows:

Authority: 15 U.S.C. 4651, et seq.

2. Revise § 231.108 to read as follows:

§ 231.108 Material expansion.

Material expansion means:

- (1) with respect to an existing facility, the increase of the semiconductor manufacturing capacity of that facility by more than five percent of the capacity memorialized in the required agreement due to the addition of a cleanroom, production line or other physical space, or a series of such additions; or
- (2) any construction of a new facility for semiconductor manufacturing.

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NIST Executive Secretariat.

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